



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE LIABILITY OF AN UNDISCLOSED PRINCIPAL.

I.

§ 1. *Preliminary Considerations as to Liability.* — It is ordinarily to the interest, as it is usually the duty, of an agent in making contracts for his principal fully to disclose the fact of the agency and to make the contract in the name and on the account of the principal. It often happens, however, that the agent will either intentionally or unintentionally omit to do this. He may (1) disclose that he has a principal but conceal his name and identity; or he may (2) wholly conceal the fact that he is an agent and contract as though he were himself the principal in the transaction. In either of these cases the agent usually makes himself personally liable upon the contract. In the second case the liability of the agent is ordinarily clear, because no other person being known in the transaction, the agent is the one upon whom the liability directly rests. In the first case also the agent may be liable because, though disclosing the fact that he has a principal, but concealing his name, he may be held to have pledged his own responsibility.

Conceding that the agent thus is, or may be, liable upon the contract, the question arises whether the principal, if discovered, may be held liable upon it also. In favor of such a liability it may be urged that inasmuch as there is a principal in the transaction who has authorized the contract to be made and who is entitled to its benefits, the principal should be held liable upon the contract when he is discovered. Against such a liability it may be urged that it is contrary to the general principles of contract to permit a person to be bound upon a contract who does not appear to be a party to it, and that in the case where no principal was known to exist the effect of such a rule is to give to the other party the benefit of a liability which he did not contemplate at the time of making the contract and for which he did not stipulate. A right to hold the undisclosed principal in such a case would, as was pointed out by a distinguished English judge, come to the other party as a mere "God-send."

Whatever may be thought where the contract is informal and oral, it is certain that where the contract is in writing, and especially where it contains no intimation of the existence of a principal, a rational theory for the principal's liability is not easy to discover. The contract is in the name and over the signature of the agent. How can that name and signature be treated as the name and signature of the principal? If the agent also could not be held upon it, it might then be said that the agent's name had, for the time being, been adopted as the business name of the principal, and was therefore, in this case, the name of the principal. But if the agent is to be held liable also because it is his name, how can the principal be held upon the theory that the name used is not the agent's name but the business name of the principal? May the name be, at the same time, the actual name of the agent and the trade name of the principal?

A theory of the legal identification of the principal with the agent leads to the same result. If the principal and the agent are legally one and that one the principal, it may not be difficult to see that the contract is the principal's contract, but it is not easy to see how the contract is also the contract of the agent.

§ 2. *General Rule — Undisclosed Principal liable when discovered.* — Notwithstanding these objections, the considerations making for the principal's liability have generally prevailed under English law, though not under the Continental systems, and it is unquestionably the general rule of our law that an undisclosed principal, when subsequently discovered, may, at the election of the other party if exercised within a reasonable time, be held liable upon all simple non-negotiable contracts made in his behalf by his duly authorized agent, although the contract was originally made with the agent in entire ignorance of the existence of a principal.¹

¹ Merrill v. Kenyon, 48 Conn. 314; Appeal of National Shoe & Leather Bank, 55 Conn. 469; Dashaway Ass'n v. Rogers, 79 Cal. 211; Simpson v. Patapsco Guano Co., 99 Ga. 168; Baldwin v. Garrett, 111 Ga. 876 (but the matter is regulated by the Code, § 3024); Guest v. Burlington Opera House Co., 74 Ia. 457; Steele-Smith Grocery Co. v. Potthast, 109 Ia. 413; Edwards v. Gildemeister, 61 Kan. 141; Jones v. Johnson, 86 Ky. 530; Ware v. Long, 24 Ky. Law Rep. 696; Hyde v. Wolf, 4 La. 234; Maxcy Mfg. Co. v. Burnham, 89 Me. 538; Henderson v. Mayhew, 2 Gill (Md.) 393; Mayhew v. Graham, 4 Gill (Md.) 363; Tobin v. Larkin, 183 Mass. 389; Schendell v. Stevenson, 153 Mass. 351; Hunter v. Giddings, 97 Mass. 41; Exchange Bank v. Rice, 107 Mass. 37; Byington v. Simpson, 134 Mass. 169; Huntington v. Knox, 7 Cush. (Mass.) 371; Eastern R. R. Co. v. Benedict, 5 Gray (Mass.) 561; Lerner v.

The rule applies not only where the principal has in fact received the benefits of the contract, but also where the contract still remains executory.¹

The rule itself is doubtless an anomaly, but even so it is undoubtedly as well settled as any other rule in the law of Agency.²

§ 3. *Rule applies to all Simple Contracts.* — This general rule imposing obligations upon the undisclosed principal when discovered, extends to all contracts made by oral negotiation under his authority. It also, by the weight of authority, applies to all simple non-negotiable contracts in writing, entered into by an agent in his own name and within the scope of his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and al-

Johns, 9 Allen (Mass.) 419; Nat'l Ins. Co. v. Allen, 116 Mass. 398; Schweyer v. Jones, 152 Mich. 241; Lindeke Land Co. v. Levy, 76 Minn. 364; Simmons Hdw. Co. v. Todd, 79 Miss. 163; Weber v. Collins, 139 Mo. 501; Lamb v. Thompson, 31 Neb. 448; Greenberg v. Palmieri, 71 N. J. L. 83; Elliott v. Bodine, 59 N. J. L. 567; Yates v. Repetto, 65 N. J. L. 294; Borchlerling v. Katz, 37 N. J. Eq. 150; Jennings v. Davies, 29 N. Y. App. Div. 227; Taintor v. Prendergast, 3 Hill (N. Y.) 72; Briggs v. Partridge, 64 N. Y. 357; Cobb v. Knapp, 71 N. Y. 348; Inglehart v. Thousand Island Hotel Co., 7 Hun (N. Y.) 547; Coleman v. First Nat'l Bank, 53 N. Y. 388; Dykers v. Townsend, 24 N. Y. 61; Meeker v. Claghorn, 44 N. Y. 349; Jessup v. Steurer, 75 N. Y. 613; Adolff v. Schmitt, 13 N. Y. Misc. 623; Davis v. Lynch, 31 N. Y. Misc. 724; City Trust Co. v. Amer. Brew. Co., 174 N. Y. 486; Patrick v. Grand Forks Merc. Co., 13 N. D. 12; Harper v. Tiffin Nat'l Bank, 54 Ohio St. 425; Smith v. Plummer, 5 Whart. (Penn.) 89; Hubbert v. Borden, 6 Whart. (Penn.) 91; Rice v. Fidelity & Casualty Co., 1 Lack. Leg. News (Penn.) 111; Episcopal Church v. Wiley, 2 Hill (S. C.) Ch. 584; s. c. 1 Riley (S. C.) Ch. 156; Waddill v. Sebree, 88 Va. 1012; Belt v. Washington Water-Power Co., 24 Wash. 387; Ford v. Williams, 21 Howard (U. S.) 287; Moore v. Sun Ptg. & Pub. Assn., 41 C. C. A. 506; Boland v. Northwestern Fuel Co., 34 Fed. 523; Higgins v. Senior, 8 M. & W. 834; Browning v. Provincial Ins. Co., L. R. 5 P. C. App. 263; Calder v. Dobell, L. R. 6 C. P. 486; Trueman v. Loder, 11 A. & E. 594; Smethurst v. Mitchell, 1 E. & E. 622; Thomson v. Davenport, 9 B. & C. 78.

¹ See Tobin v. Larkin, 183 Mass. 389; Lerner v. Johns, 9 Allen (Mass.) 419; Dykers v. Townsend, 24 N. Y. 61; Hubbert v. Borden, 6 Whart. (Penn.) 91; Waddill v. Sebree, 88 Va. 1012.

² Kayton v. Barnett, 116 N. Y. 625.

In an article upon the general subject by Professor Ames in 18 Yale Law Journal 443, it is suggested that, instead of attempting to work out a rule under which the principal can be held directly liable in an action at law, the legal liability should be held to be where the contract itself puts it, namely, upon the agent, but that then, in as much as it is the duty of the principal to exonerate the agent from the liabilities incurred on his account, the other party should be permitted in equity to avail himself of this liability of the principal to the agent, thereby putting the liability ultimately, where it justly belongs, upon the principal on whose account the contract was made. Many practical objections to a remedy purely equitable will, however, at once suggest themselves.

though the party dealing with the agent supposed that the latter was acting for himself;¹ and this rule obtains as well in respect to contracts which are required to be in writing, as to those to whose validity a writing is not essential.²

§ 4. *Parol Evidence to identify the Principal.* — For the purpose of identifying the principal, parol evidence may be admitted. It does not violate the principle which forbids the contradiction of a written agreement by parol evidence, nor that which forbids the discharging of a party by parol from the obligations of his written contract. The writing is not contradicted, nor is the agent discharged; the result is, merely, that an additional party is made liable.³ As is said by a learned judge in a Massachusetts case:

"Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency."⁴

§ 5. *Rule does not apply to Contracts under Seal.* — It was a fundamental principle of the common law that, upon an instrument under seal, those persons only can be charged who appear upon its face to

¹ *Briggs v. Partridge*, 64 N. Y. 357; *Dykens v. Townsend*, 24 N. Y. 61; *Coleman v. First Nat. Bank*, 53 N. Y. 393; *Ford v. Williams*, 21 How. (U. S.) 289; *Weber v. Collins*, 139 Mo. 501; *Waddill v. Seabee*, 88 Va. 1012; *Belt v. Washington Power Co.*, 24 Wash. 387.

² *Tobin v. Larkin*, 183 Mass. 389; *Borcherling v. Katz*, 37 N. J. Eq. 150; *Briggs v. Partridge*, *supra*. Cf. *Bourne v. Campbell*, 21 R. I. 490, probably wrong.

³ *Higgins v. Senior*, 8 M. & W. 834; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Ford v. Williams*, 21 How. (U. S.) 287; *Lindeke Land Co. v. Levy*, 76 Minn. 364 (overruling *Rowell v. Oleson*, 32 Minn. 288); *Belt v. Washington Power Co.*, 24 Wash. 387. There is language contrary in a number of cases though they are practically all distinguishable: *Ferguson v. McBean*, 91 Cal. 63 (a sealed instrument); *Gillig v. Road Co.*, 2 Nev. 214 (a negotiable instrument). *Chandler v. Coe*, 54 N. H. 561; *Heffron v. Pollard*, 73 Tex. 96; *Silver v. Jordan*, 136 Mass. 319; *Matter of Bateman*, 7 N. Y. Misc. 633; *Brown v. Tainter*, 114 N. Y. App. Div. 446, sometimes referred to, were cases of a disclosed principal and involved a different question, elsewhere considered. *Murphy v. Clarkson*, 25 Wash. 585, is *contra*, but the court apparently overlooked the distinction between ordinary simple contracts in writing and negotiable instruments, which was involved in *Shuey v. Adair*, 18 Wash. 188.

⁴ *Holmes, J.*, in *Byington v. Simpson*, 134 Mass. 169 [citing *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Eastern R. R. v. Benedict*, 5 Gray (Mass.) 561; *Lerner v. Johns*, 9 Allen (Mass.) 419; *Hunter v. Giddings*, 97 Mass. 41; *Exchange Bank v. Rice*, 107 Mass. 37; *National Ins. Co. v. Allen*, 116 Mass. 398; *Higgins v. Senior*, 8 M. & W. 834].

be the parties to it.¹ Under this rule an undisclosed principal could not be charged upon such an instrument.²

¹ "Where a contract is made by deed, under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and, therefore, if made by an attorney or agent, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it." Shaw, C. J., in *Huntington v. Knox*, 7 Cush. (Mass.) 374.

² *Huntington v. Knox*, *supra*; *Haley v. Belting Co.*, 140 Mass. 73; *Mahoney v. McLean*, 26 Minn. 415; *Briggs v. Partridge*, 64 N. Y. 357; *Kiersted v. Orange*, etc. R. Co., 69 N. Y. 343; *Schaefer v. Henkel*, 75 N. Y. 378; *Henricus v. Englert*, 137 N. Y. 488; *Farrar v. Lee*, 10 N. Y. App. Div. 130; *Whitehouse v. Drisler*, 37 N. Y. App. Div. 525; *Williams v. Magee*, 76 N. Y. App. Div. 512; *Spencer v. Huntington*, 100 N. Y. App. Div. 463 (aff'd without opinion 183 N. Y. 506); *Denike v. De Graaf*, 87 Hun, 61 (aff'd, no opinion, 152 N. Y. 650); *Benham v. Emery*, 46 Hun 156; *Smith v. Pierce*, 60 N. Y. Supp. 1011; *Stanton v. Granger*, 125 N. Y. App. Div. 174; *Willard v. Wood*, 135 U. S. 309, 313; *Badger Silver Min. Co. v. Drake*, 31 C. C. A. 378; *City of Providence v. Miller*, 11 R. I. 272.

Briggs v. Partridge, 64 N. Y. 357, is a leading case. In this case it appeared that an agent appointed by parol had, without disclosing his agency, made in his own name a contract under seal for the purchase of real estate, but it was held that the contract was not enforceable against the principal either as a contract under seal or as a simple contract. Andrews, J., said: "Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. . . . The plaintiff's agreement in this case was with Hurlburt (the agent) and not with the defendant. The plaintiff has recourse against Hurlburt on his covenants, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to, or interested in it, on proof *dehors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal, so as to embrace this case." See also *Tuthill v. Wilson*, 90 N. Y. 423. So the rule that an unnamed and unknown principal shall stand liable for the contract of his agent does not apply to a lease under seal. The relation between the owner of land and those who occupy it is of a purely

The common-law incidents attached to the presence of a seal were confessedly highly technical, and efforts have been made in many places to abolish them. In several States statutes have been enacted, though not always in the same form or having the same effect. In Minnesota, for example, the statute has abolished seals and declared that the addition of a seal to an instrument shall "not affect its character in any respect." Under this statute it has been held that an undisclosed principal may be charged upon an instrument under seal.¹

On the other hand in Texas, where the statute declares that a seal shall not be necessary to the validity of any contract, etc., and that the addition of a seal shall not "in any way affect the force and effect of the same," it was held that the statute had not changed the common-law rule with respect to the undisclosed principal.²

§ 6. — With reference to authority for the execution of instruments, a distinction has been made, between instruments to whose validity a seal is an essential and those to which a seal may happen to be attached but which would be perfectly valid and effective without it, — it being held in the latter case that the unnecessary seal might be disregarded as so much surplusage and the instrument dealt with, so far as authority for its execution is concerned, as though no seal were attached.

Extending that doctrine still further, it has been suggested that it may be availed of here, — that is to say, that for the purpose of charging an undisclosed principal an unnecessary seal may be regarded as non-existent; and a number of cases have adopted the

legal character, and the fact that a lessee takes a lease for an unnamed principal, but in his own name, will not render the unnamed principal liable for the rent. *Borchering v. Katz*, 37 N. J. Eq. 150. And this is true although the fact of the agency is recited and it extrinsically appears that the lessee acted as agent, and although the principal occupies the premises without assignment of the lease and furnishes money to pay the rent. *Kiersted v. Orange*, etc. R. R. Co., 69 N. Y. 343. See also *Haley v. Belting Co.*, 140 Mass. 73; *Schaefer v. Henkel*, 75 N. Y. 378; *Rand v. Moulton*, 72 N. Y. App. Div. 236.

A contract for the sale of land made by the agent under seal in his own name and not disclosing any principal cannot be specifically enforced against the principal even though it be alleged that he ratified it. *Stanton v. Granger*, 125 N. Y. App. Div. 174. No action for damages against the principal will lie in such a case. *Mahoney v. McLean*, 26 Minn. 415.

¹ *Streeter v. Janu*, 90 Minn. 393. To same effect, *Gibbs v. Dickson*, 33 Ark. 107,

² *Sanger v. Warren*, 91 Tex. 472. See also *Jones v. Morris*, 61 Ala. 518, 524.

suggestion, at least so far as to permit the undisclosed principal to sue upon the contract.¹

So far as action upon the contract itself is concerned, however, many other cases, chiefly in New York, have refused to apply this theory, and have held to the general rule.²

In a few cases contracts clearly intended to be the contract of the principal, but sealed with the seal of the agent, have been held enforceable by and against the principal as simple contracts.³

There undoubtedly may also be cases in which, though no action will lie against the principal upon the contract itself, there may yet be such elements of adoption or receipt of benefits of a contract actually authorized by him as to justify a recovery against him upon an implied promise.⁴

§ 7. *Does not apply to Negotiable Instruments.* — In addition to the limitation upon the principal's liability growing out of the nature of the instrument under seal, "there is," as pointed out in a case already referred to,⁵ "a well-recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent." This doctrine has been applied in many cases.⁶

It is entirely possible, however, notwithstanding this rule, that an action may, in many instances, be maintained against the principal,

¹ *Stowell v. Eldred*, 39 Wis. 614; *Kirschbon v. Bonzel*, 67 Wis. 178; *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427; *Love v. Sierra Nevada, etc. Co.*, 32 Cal. 639.

² *Briggs v. Partridge*, 64 N. Y. 357; *Kiersted v. Orange, etc. R. Co.*, 69 N. Y. 343; *Schaefer v. Henkel*, 75 N. Y. 378; *Henricus v. Englert*, 137 N. Y. 488; *Spencer v. Huntington*, 100 N. Y. App. Div. 463; *Denike v. De Graaf*, 87 Hun (N. Y.) 61; *Smith v. Pierce*, 60 N. Y. Supp. 1011; *Stanton v. Granger*, 125 N. Y. App. Div. 174, and other New York cases cited *supra*.

³ *Randall v. Van Vechten*, 19 Johns. (N. Y.) 60; *Dubois v. Delaware & Hud. Canal Co.*, 4 Wend. (N. Y.) 285.

⁴ *Moore v. Granby Mining Co.*, 80 Mo. 86.

⁵ *Briggs v. Partridge*, 64 N. Y. 357.

⁶ *Heaton v. Myers*, 4 Colo. 59; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531; *Webster v. Wray*, 19 Neb. 558; *Cortland Wagon Co. v. Lynch*, 82 Hun (N. Y.) 173; *Ranger v. Thalmann*, 84 N. Y. App. Div. 341; affirmed on opinion below, 178 N. Y. 574; *Andenton v. Shoup*, 17 Ohio St. 126; *Shuey v. Adair*, 18 Wash. 188; *Cragin v. Lovell*, 109 U. S. 194; *Ducarrey v. Gill, Mood. & Mal.* 450.

not upon the note itself, but upon the consideration for which it was given.¹

§ 8. *Exceptions to the General Rule.* — The general rule, moreover, is subject to certain exceptions. Of these the most direct and immediate are two. One of them grows out of the question whether the other party should be permitted to recover of the principal if the latter has already paid, credited, or settled with the agent. The other, whether such a recovery should be allowed if the other party has already taken steps indicating that he intends to charge the agent.

For the purpose of discussion, these two exceptions may be tentatively stated as follows:

1. *Where Principal has settled with Agent.* — That the principal is not liable where, before the other party has intervened with his claim, the principal has settled with, paid, or credited the agent in good faith, and in reliance upon such a state of conduct or representations on the part of the other party as to reasonably lead the principal to infer that the agent had already settled with such other party, or that the latter looks exclusively to the agent for payment.

2. *Where other Party has elected to hold Agent only.* — That the principal cannot be held liable where the other party, with full knowledge as to who was the principal, and with the power of choosing between him and the agent, has distinctly and unquestionably elected to treat the agent alone as the party liable.

§ 9. *Of the First Exception — Change in Accounts — Misleading Conduct.* — This subject has been much discussed in the English courts and various and conflicting rules have been laid down in successive cases. Some of these rules have been adopted by the courts and text-writers in this country, but have been afterwards denied or limited by later cases in the English courts, and the result has been an exceedingly unsatisfactory condition of the law.

§ 10. *Thomson v. Davenport.* — One of the earliest of these cases is that of *Thomson v. Davenport*,² decided in the Court of King's Bench in 1829. In that case the agent disclosed that he was acting for a principal in Scotland but did not disclose his principal's name. Lord Tenterden, in his opinion, said:

"I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards

¹ *Coaling Co. v. Howard*, 130 Ga. 807.

² 9 Barn. & Cress. 78.

discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal”;

and Bayley, J., in the same case, said:

“Where a purchase is made by an agent, the agent does not, of necessity, so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent.”

The rule as laid down by Lord Tenterden was approved by Mr. Parsons in his work on Contracts,¹ and by Judge Story in his work on Agency.² It was also adopted in Indiana.³

§ 11. *Heald v. Kenworthy*. — Following this case came *Heald v. Kenworthy*,⁴ decided in the Exchequer in 1855. The case arose upon the sufficiency of a plea to a declaration for goods sold and delivered. The plea alleged that the goods were bought for defendant by his agent; that the latter bought in his own name and not in that of defendant; that plaintiff gave credit to the agent not knowing of defendant; and that while plaintiff still gave credit to the agent defendant, in good faith, “at reasonable and proper times and according to the usual course of dealing” between himself and his agent, settled with the agent, believing and having reason to believe that the latter would settle with the plaintiff.

The plea was held not to be good. The expressions of Lord Tenterden and Bayley, J., were shown to be mere *dicta*, and were held to be inaccurate statements of the law. Parke, B., who delivered the leading opinion, limited the rule to those cases in which the principal has been misled by the action of the seller, saying:

¹ 1 Parsons on Contracts, 63.

³ *Thomas v. Atkinson*, 38 Ind. 248.

² Story on Agency, § 449.

⁴ 10 Exch. 739.

"If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal."

§ 12. *Armstrong v. Stokes*. — Afterwards arose the case of *Armstrong v. Stokes*,¹ decided in the Court of Queen's Bench in 1872. In this case J. & O. Ryder, who were commission merchants at Manchester, acting sometimes for themselves and sometimes as agents, having received an order for goods from defendants, bought them of plaintiff, without disclosing that they were not acting for themselves.

J. & O. Ryder delivered the goods to defendants, who paid for them in good faith. Afterward J. & O. Ryder failed, not having paid the plaintiff. Later it was discovered by plaintiff that J. & O. Ryder had bought the goods for the defendants, and thereupon the plaintiff brought the action to charge defendants as undisclosed principals, but it was held that defendants' payment to J. & O. Ryder was a bar to recovery. Blackburn, J., who delivered the opinion of the court (Blackburn, Mellor, and Lush), held that the rule laid down by Parke, B., was too narrow, and cited and approved that advanced by Lord Tenterden and Mr. Justice Bayley.

Referring to the rule of Parke, B., the court say:

"We think that if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship. It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker, who avowedly acts for a principal (though not necessarily named), and confining ourselves to the present case, which is one in which, to borrow Lord Tenterden's phrase in *Thomson v. Davenport*,² the plaintiff sold the goods to J. & O. Ryder (the agents), 'supposing at the time of the contract he was dealing with a principal,' we think

¹ L. R. 7 Q. B. 598, 3 Eng. (Moak) 217.

² *Supra*.

such an exception is established. We wish to be understood as expressing no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account, so as to give rise to a set-off or mutual credit between them. We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, *bonâ fide* and without moral blame, paid J. & O. Ryder at a time when the plaintiff still gave credit to J. & O. Ryder and knew of no one else. We think that after that it was too late for the plaintiff to come upon the defendant."

§ 13. *Irvine v. Watson* — *In the Queen's Bench*. — This case, in its turn, was followed by *Irvine v. Watson*,¹ decided in the Queen's Bench in 1879, in which Bowen, J., laid down the following rules:

"There are two classes of sales through an agent to an undisclosed principal which it is necessary to distinguish. 1. Where the seller supposes himself to be dealing with a principal, but discovers afterwards that he has been selling to an agent, and that there is an undisclosed principal behind, the law allows the seller to have recourse on such discovery to the undisclosed principal, provided always² that the principal has not meanwhile paid the agent, or that the state of accounts between the principal and agent does not render it unjust, *i. e.*, inequitable that the seller should any longer look to the principal for payment. This statement of the proviso which relieves the undisclosed principal in certain cases from all necessity to pay the seller was thought by Parke, B., and the other judges in *Heald v. Kenworthy*³ to be too large without further explanation, and they expressed the view that the only case in which the seller under such circumstances was precluded from having recourse to the undisclosed principal when discovered, was when the seller, by some conduct of his own, had misled the principal into paying or settling with his agent in the interim. The principal, such is the reasoning of the Court of Exchequer, has originally authorized his agent to create a debt, and the principal cannot be discharged from the debt unless the seller has estopped himself, by his conduct, from enforcing it against him. The Court of Queen's Bench in *Armstrong v. Stokes*⁴ do not adopt this narrower version of Lord Tenterden's and Mr. Justice Bayley's proviso. They revert to the wider language used by Lord Tenterden and Bayley, J., in *Thomson v. Davenport*,⁵ and it must now be taken to be the law that a seller who has given credit to an agent, believing him to be a principal, cannot have re-

¹ 5 Q. B. Div. 102, 29 Eng. Rep. (Moak) 186.

² See per Lord Tenterden, C. J., and Bayley, J., in *Thomson v. Davenport*, 9 B. & C. 78.

³ 10 Exch. 745.

⁴ *Supra*.

⁵ *Supra*.

course against the undisclosed principal, if the principal has *bonâ fide* paid the agent at a time when the seller still gave credit to the agent, and knew of no one else except him as principal.

"2. The present case is one that belongs to a distinct but analogous class. At the time of the dealing in the goods, the seller was informed that the person who came to buy was buying for a principal, but was not told, and did not ask, who that principal was, nor anything further about him. *Thomson v. Davenport*¹ is the leading authority to show that, in such a case, where no payment or settlement in account between the undisclosed principal and his agent has intervened, the seller may afterwards have recourse to the undisclosed principal. But what if the undisclosed principal has meanwhile innocently paid or settled with his agent? If indeed such payment or settlement is the result of any misleading conduct on the part of the seller, then, no doubt, the general principle alluded to in *Heald v. Kenworthy*² would equally apply, and the seller could no longer pursue his remedy against the man whom he had misled. But is this the only proviso, or must a wider proviso still in the present class of cases be engrafted on the statement of the rule, similar to the proviso as finally sanctioned in *Armstrong v. Stokes*.³ This was a case in which, at the time of sale, exclusive credit had been given by the seller to the agent, who bought in his own name as principal. In the present instance the agent bought, it is true, in his own name, but held out to the seller the additional advantage of the credit of an unnamed principal behind. What difference to the liability of the principal does this make? It is obvious that when, as in *Armstrong v. Stokes*,⁴ the seller deals exclusively with the agent as principal, the seller sells knowing, if his buyer turns out to have a principal behind him, the principal will have, at all events, been justified in assuming, as the fact is, that the seller deals simply with the agent. The principal may be expected to arrange with his agent on this basis. If before recourse is had to him, the undisclosed principal has put his agent in funds to pay, the seller cannot afterward object that the undisclosed principal, who had a right to suppose his credit was not looked to in the matter, should have held his hand. The case is altered where the agent, when buying, states he has a principal whose existence, though he does not name him, he is authorized in mentioning. I think that the liability of the principal, who under such circumstances pays his agent, to pay over again to the seller must depend in each case on what passes between the seller and the agent, acting within the scope of his authority, and on the precise nature of the contract which the agent has lawfully made. . . . The essence of such a transaction is that the seller, as an ultimate resource,

¹ *Supra.*

³ *Supra.*

² *Supra.*

⁴ *Supra.*

looks to the credit of some one to pay him if the agent does not. Till the agent fails in payment, the seller does not want to have recourse to this additional credit. It remains in the background; but if, before the time comes for payment, or before, on non-payment by the agent, recourse can be fairly had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller behind the seller's back of his credit. It surely must, at all events, be the law that in the case of sales of goods to a broker the principal, known or unknown, cannot, by paying or settling before the time of payment comes, with his own agent, relieve himself from responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and if so within what time? It seems to me that it can only safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit, — such a delay, for example, as leads to the inference that the debt is paid by the agent, or to the inference that, though the debt is not paid, the seller elects to abandon his recourse to the principal and to look to the agent alone."

§ 14. *Irvine v. Watson in the Court of Appeal.* — *Irvine v. Watson*, however, went to the Court of Appeal,¹ where, while the result reached below was affirmed, the court declare the rule as laid down by Parke, B., in *Heald v. Kenworthy*, to be the true one.

The court did not expressly overrule *Armstrong v. Stokes* [Bramwell, L. J., spoke of it as "a very remarkable case"; and Brett, L. J., declared it depended upon "the peculiar customs obtaining in Manchester in relation to the business of commission merchants"], as the difference in the facts enabled them to draw a distinction between the cases, but Bramwell, L. J., said:

"It is to my mind certainly difficult to understand that distinction, or to see how the mere fact of the vendor's knowing or not knowing that the agent has a principal behind him can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say, whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default";

and Brett, L. J., said:

¹ 5 Q. B. Div. 414. The opinions differ more or less as reported in these various reports. The quotations in the text are made from the official edition.

"If the case of *Armstrong v. Stokes* arises again, we reserve to ourselves sitting here, the right of reconsidering it."

The distinction of Parke, B., was again approved in *Davison v. Donaldson*,¹ decided in the Court of Appeal in 1882.

The result, therefore, of the English cases seems to be to limit the exception to that first stated by Parke, B.

§ 15. *What is Misleading Conduct.* — The question of what acts or conduct of the other party may be sufficient to reasonably lead the principal to believe that the agent only is relied upon, has not been much considered, and it is not one which readily lends itself to definite rules. It must be largely a question of fact in each particular case. In *Irvine v. Watson*² the defendants had given their broker an order to buy goods and the broker had bought them in his own name of the plaintiffs, stating that he had a principal but not disclosing his identity. The invoice given by plaintiffs to the broker stated that the terms were, "Cash (or before delivery if required) allowing 2½ per cent discount." The broker rendered to defendants a statement of the purchase stating terms of payment, "Cash, less 2½ per cent." The sellers however did not insist upon cash on or before delivery. They made no demand on the broker for payment for five or six days. Then they demanded payment from him at intervals for about ten days, after which, the broker having stopped payment, they made demand for the first time upon defendants. In the meantime defendants had paid the broker. Under these circumstances defendants urged that they had a right to believe from the fact that the terms were "cash," that plaintiffs would not have delivered the goods unless they had gotten their pay, and that therefore defendants were justified in paying the broker within the rule of *Heald v. Kenworthy*. It appeared, however, that even where the

¹ L. R. 9 Q. B. Div. 623.

² *Irvine v. Watson*, 5 Q. B. Div. 414.

In *Kymer v. Suwercroft*, 1 Camp. 109, it was said that permitting the time of payment to pass without a demand upon the principal was a misleading circumstance; but no such point was actually involved in the case. See *Smyth v. Anderson*, 7 C. B. 21. Cf. *Macfarlane v. Giannacopulo*, 3 H. & N. 860. See this point in *Armstrong v. Stokes*, *supra*; also the argument in *Heald v. Kenworthy*, 10 Exch. 739.

In *Horsfall v. Fauntleroy*, 10 B. & C. 755, a statement in a sales catalogue that the terms of credit on which the agent bought were bill at two months was held sufficient to lead the principal to believe that the agent must have given his bill for the goods and to protect him in thereupon accepting the agent's draft.

terms of sale were "cash," there was no fixed custom of insisting upon payment at the precise time of delivery, and that it was not infrequent to allow a few days of grace after delivery. It also appeared that defendants had paid the broker (by accepting his draft which he immediately discounted) before part of the goods had in fact been delivered. It was held that these facts furnished no sufficient evidence that defendants had been misled by the plaintiffs. Bramwell, L. J., said:

"The terms of the contract were 'cash on or before delivery,' and it is said that the defendants had a right to suppose that the sellers would not deliver unless they received payment of the price at the time of delivery. I do not think, however, that this is a correct view of the case. The plaintiffs had a perfect right to part with the oil to the broker without insisting strictly upon their right to prepayment, and there is, in my opinion, nothing in the facts to justify the defendants in believing that they would so insist. No doubt if there was an invariable custom in the trade to insist on prepayment where the terms of the contract entitled the seller to it, that might alter the matter; and in such case non-insistence on prepayment might discharge the buyer if he paid the broker on the faith of the seller already having been paid. But that is not the case here: the evidence shows that there is no invariable custom to that effect."

In *Davison v. Donaldson*¹ one of several owners of a boat bought supplies for her of the plaintiffs. The latter knew that there were other owners, though it does not appear that he knew who they were. The goods were charged to the one who bought them. He collected the amount from the other co-owners but did not pay the plaintiff. The plaintiff finally sued the other owners. Their defense was that they had settled with the managing owner believing that he had paid the plaintiff, and that they had been misled by the fact that the plaintiff had not pressed his claim against the purchaser who had now become insolvent. It did not appear, however, that there had been any unreasonable delay at the time they settled with the managing owner, and the real gist of the defendants' contention was that if they had known of plaintiffs' claim against them they could have recovered the money from the managing owner before he became insolvent. This was held not sufficient to release defendants. Jessel, M. R., said:

¹ *Davison v. Donaldson*, 9 Q. B. Div. 623. See also *The Huntsman* [1894], p. 214.

"The principal cannot be heard to say that the subsequent conduct of the plaintiff induced him not to sue the agent for repayment of the money. Independently of the settlement of accounts there is no evidence that the mere abstaining from pressing the agent is an injury to the principal. A debtor must find out his creditor and go and pay him. . . . No doubt in many cases principals may reasonably rely on the honor of their agents, and may not require vouchers; but when they come into a court of law and seek to excuse themselves from liability, and it turns out that they have not required the production of vouchers, they must expect the court to deal strictly with them."

Bowen, L. J., said:

"I do not say that in very special circumstances mere delay may not amount to misrepresentation: it may be conduct misleading the defendant. But that can only be when there is something in the original contract or in the conduct of the parties which renders the delay misleading. The creditor is not obliged to apply to all his debtors if he can get payment from one of them."

This case, however, as was pointed out by the judges, was not the mere case of principal and agent because the defendants were co-owners or partners with the managing owner and jointly liable with him.

Giving the agent a receipt for the price, even though mistakenly, upon the strength of which the principal in good faith pays or credits the agent, will be such conduct as protects the principal.¹

§ 16. — It must be kept in mind that this exception differs from the one to be discussed in a subsequent article. This is not a question of election but of misleading. It is essential here that the principal shall have done something — shall have paid or credited or otherwise altered his situation — which will prejudice him if he now be called upon to pay. No such act is necessary where election alone is involved.

It is also possible that that which would not suffice to constitute an election may be sufficient to relieve the principal under this rule if he has reasonably acted upon it to his prejudice. For example, the commencement of suit against the agent is, as will be seen, not usually regarded as sufficient to constitute an election. But would the principal be liable again if, after the other party who knows

¹ *Cheever v. Smith*, 15 Johns. (N. Y.) 276; *English v. Rauchfuss*, 21 N. Y. Misc. 494; *Brown v. Telegraph Co.*, 30 Md. 39; *Hyde v. Wolf*, 4 La. 234.

there is a principal has sued the agent, the principal in reliance thereon should pay the agent?

§ 17. *The Rule in the United States.* — The subject has not very frequently arisen in the United States, and has not been thoroughly considered in any very recent case by a court of last resort. In the earlier cases, as was naturally to be expected, the tendency was to follow the rule laid down by Judge Story and Professor Parsons, based upon the *dictum* of Lord Tenterden.¹ A general statement of the rule was made some years ago by the New York Court of Appeals² with the exception, "provided he has not in the meantime in good faith paid the agent"; but the statement was a mere *dictum*. Most of the cases which have arisen since *Irvine v. Watson* was decided by the Court of Appeal have either ignored that decision or apparently failed to note its full significance.³

§ 18. *General Conclusions.* — Notwithstanding the remarks of Bramwell, L. J., the distinction between the case where the other party knows that there is a principal in existence though he does not

¹ Thus, for example, in 1847, in *Clealand v. Walker*, 11 Ala. 1058; in 1855, in *Fish v. Wood*, 4 E. D. Smith (N. Y. Com. Pleas), 327; in 1871, in *Thomas v. Atkinson*, 38 Ind. 248; in 1879, in *McCullough v. Thompson*, 45 N. Y. Super. 449. See also *Ketchum v. Verdell*, 42 Ga. 534; *Emerson v. Patch*, 123 Mass. 541. The Georgia code enacts substantially the rule of *Thomson v. Davenport*.

On the contrary, in 1866, in *York County Bank v. Stein*, 24 Md. 447, the rule of Baron Parke in *Heald v. Kenworthy* was approved in reliance upon the statement of the editor of Story on Agency.

² *Knapp v. Simon* (1884), 96 N. Y. 284.

³ The question was quite fully considered in 1885 in *Laing v. Butler*, 37 Hun (N. Y.) 144. The court cites *Armstrong v. Stokes* and *Irvine v. Watson* as applying to different classes of cases, and apparently without attaching much importance to the comments made upon the former case by the Court of Appeal when *Irvine v. Watson* was before it.

There is also a very interesting discussion in *Fradley v. Hyland* (1888), 37 Fed. 49; *Irvine v. Watson*, in the Queen's Bench Division, is cited, but not the case in the Court of Appeal.

A very general reference to the matter is made in *Berry v. Chase*, 146 Fed. 625. See the cases reviewed (in 1889) by Mr. John W. Beaumont in 23 American Law Review 565.

The question was involved in *Nicholson v. Pease*, 61 Vt. 534, and the syllabus indicates the case as holding that "a traveling salesman who is furnished with money by his employer to pay his expenses while on the road, cannot bind his principal for the payment of such expenses if, before receiving notice from the party extending such credit, the employer has settled with his salesman and allowed him the amount of such expenses." There is, however, no discussion of this point in the opinion.

There is a statement of the English rule as a *dictum* in *Simmons Hardware Co. v. Todd*, 79 Miss. 163, and *Guest v. Burlington Opera House Co.*, 74 Iowa 457.

know who he is, and that where he is totally ignorant of the existence of such a person, seems not without significance. Certainly if the other party is to be charged with the consequences of his misleading conduct, it seems much more reasonable and just to do so where he knows that there is a principal whose actions may be affected by his conduct than where he has no such knowledge. It may be suggested that every person who deals without expressly excluding that possibility may always be regarded as potentially an agent with an undisclosed principal; but the suggestion seems forced, if not fanciful.

Nevertheless, the rule of Parke, B., seems on the whole to be reasonable and just. If a principal sends an agent to buy goods for him and on his account, it is not unreasonable that he should see that they are paid for. Although the seller may consider the agent to be the principal, the actual principal knows better. He can easily protect himself by insisting upon evidence that the goods have been paid for, or that the seller, with full knowledge of the facts, has elected to rely upon the responsibility of the agent; and if he does not, but, except where misled by some action of the seller, voluntarily pays the agent without knowing that he has paid the seller, there is no hardship in requiring him to pay again. If the other party has the right, within a reasonable time, to charge the undisclosed principal upon his discovery, — and this right seems to be abundantly settled in the law of agency, — it is difficult to see how this right of the other party can be defeated, while he is not himself in fault, by dealings between the principal and the agent, of which he had no knowledge, and to which he was not a party.

Floyd R. Mechem.

THE UNIVERSITY OF CHICAGO.

[*To be concluded.*]